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after the Steelworkers Trilogy*

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THE KENNETH M. PIPER LECTURE

UNIONS WITHOUT MAJORITY—A BLACK HOLE? *Clyde Summers* 531

In response to the steadily shrinking proportion of private sector workers covered by collective bargaining agreements, Professor Summers explores the potential function of a union which has not achieved majority status. He emphasizes that section 9 (a) of the Labor Act, which empowers a majority union to represent all employees in the bargaining unit, does not eviscerate basic section 7 rights of employees or deprive a minority union of the right to represent its members when there is no majority union. He suggests a variety of significant functions which such a non-majority union could perform in protecting the rights of its members in the workplace.

SYMPOSIUM ON LABOR ARBITRATION THIRTY YEARS AFTER THE STEELWORKERS TRILOGY

MARTIN H. MALIN
SYMPOSIUM EDITOR

FOREWORD: LABOR ARBITRATION THIRTY YEARS AFTER THE STEELWORKERS TRILOGY

Martin H. Malin 551

Professor Malin begins by reviewing the law of arbitration before the *Steelworkers Trilogy*. He discusses the federalization of collective bargaining and the *Trilogy*. He then briefly reviews the state of labor relations, labor law, and arbitration currently, some three decades after the *Trilogy*. Finally, he provides an overview of the symposium.

LABOR ARBITRATION AS A CONTINUATION OF THE COLLECTIVE BARGAINING PROCESS

Charles B. Craver 571

Labor arbitration procedures constitute a continuation of the collective bargaining process, with arbitrators being the persons selected to decide unresolved contractual disputes. Recalcitrant parties should be ordered to arbitrate all controversies that are arguably covered by the arbitration clause, and arbitral awards should be judicially enforced except when arbitrators have clearly exceeded their contractual authority. While Labor Board deferral is appropriate for refusal-to-bargain cases, it should be used sparingly with respect to individual rights disputes having no connection with the bargaining process.

THE STEELWORKERS TRILOGY IN THE PUBLIC SECTOR

Ann C. Hodges 631

Professor Hodges reviews the role of the judiciary in public sector grievance arbitration, pointing out that many courts have rejected the applicability of the *Trilogy* principles

to public sector arbitration either explicitly or implicitly, by citing the *Trilogy* while ignoring its dictates. She argues that the *Trilogy* judicial standards deferential to arbitration are appropriate for the public sector, as well as the private sector.

**LIMITING SECTION 301 PREEMPTION:
THREE CHEERS FOR THE TRILOGY,
ONLY ONE FOR *LINGLE* AND *LUECK***

Michael C. Harper 685

Professor Harper commends the presumption in favor of arbitration adopted by the *Steelworkers Trilogy*, but he is critical of the degree of deference given to arbitration in the Court's more recent section 301 preemption cases, *Lingle v. Norge* and *Allis-Chalmers Corp. v. Lueck*. Professor Harper argues that whether an employee protected by a collective bargaining agreement should be able to claim some minimum employment right granted by state law should generally turn on whether that right would exist in the absence of the collective agreement, rather than on whether protection of the right requires an interpretation of the agreement.

**ARBITRATION OF EMPLOYMENT
DISPUTES WITHOUT UNIONS**

Samuel Estreicher 753

Professor Estreicher considers the role of arbitration of employment disputes in a world in which the vast number of American workers either are not afforded or do not desire collective representation. Part I addresses the advisability of importing the aggressive pro-arbitration policies of the *Steelworkers Trilogy* into the nonunion context, urging caution in applying these principles to disputes where arbitration is more a private substitute for court or agency adjudication than an instrument of industrial self-government. Nonetheless, arbitration in nonunion settings can be a useful mechanism for resolving disputes without some of the costs attending litigation in the courts; hence, predispute promises to arbitrate ordinarily should be enforceable on terms consistent with generally applicable contract law.

Part II shifts the discussion to the role of arbitration under the at-will assumptions of existing law. The author draws a distinction between arbitration clauses contained in unilateral employer policies and arbitration promises in bilateral employment agreements. Clauses contained in unilateral policies, while perhaps binding commitments on the employer's part, are not written arbitration agreements subject to the Federal Arbitration Act (FAA) or cognate state laws, and should not be treated as promises by the employee to arbitrate under external law. "Company union" objections to the use of coworkers as advocates for employee-claimants or as peer members of an in-house dispute resolution process for claims under such policies are discussed.

Concerning arbitration promises in bilateral employment agreements, which may be subject to the FAA and similar state laws, the Supreme Court's FAA decisions suggest that the statutory presumption of arbitrability may extend to claims under federal and state protective labor laws. Those decisions did not, however, involve employment disputes and did not consider the exclusion in section 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In deciding whether to construe the section 1 exclusion literally or, in line with the specific focus of Congress in 1925, to confine its reach to collective bargaining agreements, the author examines several policy objections to binding arbitration of employee claims under federal and state protective labor laws. Professor Estreicher suggests an approach for accommodating the FAA's presumption of arbitrability with the policies of the federal statutes like Title VII of the 1964 Civil Rights Act and the 1967 Age Discrimination in Employment Act that permits the parties to an employment relationship to secure the advantages of predispute arbitration promises without undermining the substantive goals of external public law.

Part III of the Article offers an assessment of the role of arbitration in a future world of statutory "just cause" regimes. Contrary to leading proposals in the literature, Professor Estreicher concludes that as a public adjudicative mechanism, mandatory arbitration is a highly problematic alternative to administrative agencies.

This Article was submitted to the *Law Review* in November 1990 and thus does not reflect developments after that date. On May 31, 1991, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991). The holding of *Gilmer*—that claims arising under the Age Discrimination in Employment Act, and presumably other federal and state employment laws, are arbitrable by virtue of the FAA—is broadly

congruent with the position taken in Part II of the Article. However, the *Gilmer* Court sidesteps the question whether arbitration clauses contained in individual employment agreements fall within the section 1 exclusion.

As urged in the Article, the *Gilmer* case presented an opportunity to reconcile the pro-arbitration policy of the FAA with the aims of protective labor legislation. The Court bypassed the opportunity, and, in the process, left unresolved not only the reach of the exclusionary clause but also the responsibilities of the arbitral forum and reviewing court to ensure that the substantive policies of the labor laws are being honored.

COMMENTARY ON "ARBITRATION OF EMPLOYMENT DISPUTES WITHOUT UNIONS"

Matthew W. Finkin 799

Professor Finkin takes issue with Professor Estreicher on the use of arbitration to resolve employment disputes in bilateral contracts of employment, and in unilaterally promulgated employer policies. Professor Finkin argues that the Federal Arbitration Act ought to be read as inapplicable to contracts of individual employment. He also argues that in the case of employer policies, an employer cannot give assurances of fairness, while reserving to itself the final authority to decide if it has acted fairly.

REPLY TO PROFESSOR FINKIN

Samuel Estreicher 817

GRIEVANCE PROCEDURES IN NONUNION WORKPLACES: AN EMPIRICAL ANALYSIS OF USAGE, DYNAMICS, AND OUTCOMES

David Lewin 823

This article examines the growth, uses, settlements, and post-settlement consequences of grievance and appeal procedures in nonunion U.S. business. Quantitative analysis of grievance file, personnel record, and survey response data suggests that grievance filers may suffer reprisals for using the grievance procedure in the form of lower performance appraisals and promotion rates and higher turnover rates than for nonusers. In addition, the analysis shows that employee loyalty is negatively related to grievance procedure usage, and that grievance procedure usage is positively related to employee intent to leave (exit) the business. The article also differentiates and measures managers' and employees' perceptions of grievance procedure effectiveness in a nonunion setting.

AFTERWORD

Theodore J. St. Antoine 845

The institution of labor arbitration is highly adaptable, and may go all the way from the private, contractual arbitration of collective bargaining disputes to the private, contractual arbitration of statutory issues to contractual arbitration in the public sector and eventually to publicly mandated statutory arbitration in the private sector.

NOTES

PENNSYLVANIA'S ANTITAKEOVER STATUTE: AN IMPERMISSIBLE REGULATION OF THE INTERSTATE MARKET FOR CORPORATE CONTROL

Gary M. Holihan 863

STATE TAXATION OF PUERTO RICAN OBLIGATIONS: AN INTEREST(ING) QUESTION

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THE KENNETH M. PIPER LECTURESHIP SERIES

The Kenneth M. Piper Lectureship Series is dedicated to the memory of Mr. Kenneth M. Piper, who made substantial contributions to the fields of personnel management and labor relations during more than two decades of service with Motorola, Inc. and Bausch & Lomb, Inc.

This year's Piper Series featured a lecture by Professor Clyde Summers, the Jefferson D. Fordham Professor of Law at the University of Pennsylvania. Commentary on Professor Summers' lecture was provided by Edward B. Miller, Partner, Pope, Ballard, Shephard and Fowle, and Robert H. Stropp, Jr., General Counsel, United Mine Workers of America.

The following article is based on Professor Summers' lecture. The editors and staff of the Chicago-Kent Law Review wish to express their continuing appreciation to Mrs. Kenneth M. Piper for supporting scholarship and discussion in this important area of the law.

**SYMPOSIUM ON CLASSICAL
PHILOSOPHY AND THE AMERICAN
CONSTITUTIONAL ORDER**

**Linda R. Hirshman
Symposium Editor**

